WISCONSIN ASSOCIATION *for* JUSTICE

Testimony
of
Mark L. Thomsen
on behalf of the
Wisconsin Association for Justice
Before the
Senate Judiciary, Corrections, Insurance,
Campaign Finance Reform and Housing Committee
On
Senate Bill 203
August 18, 2009

Senator Taylor and members of the Committee, I am Mark L. Thomsen, a shareholder of the law firm Cannon & Dunphy, S.C. in Brookfield, Wisconsin. I serve as president of the Wisconsin Association for Justice. I appear here today to speak in support of Senate Bill 203, also referred to as "The Family Justice Bill."

The Wisconsin Association for Justice (WAJ), formerly the Wisconsin Academy of Trial Lawyers, is a voluntary, statewide bar association whose members are attorneys who practice in the area of personal injury litigation. As lawyers who represent injured consumers, our members are often the ones who must tell families Wisconsin law does not recognize the right of an adult child or a parent of an adult child to bring a claim for wrongful death in medical malpractice cases. Family members are incredulous. It is inconceivable to them that a death caused by an alleged case of medical malpractice can go unpunished. Unfortunately, there is nothing we can do to ease their pain and provide justice for the family.

Of the 50 states and the District of Columbia, Wisconsin is one of only seven jurisdictions that bar or limit adult children's right to bring a wrongful death claim for the death

of a parent in a medical malpractice case.[1] In fact, if the doctor had killed the person in an automobile accident, a wrongful death claim could be filed. This is absolutely nonsensical. Negligent health care providers in an operating room should not be treated differently than negligent car drivers.

WAJ believe this bill is a simple issue of fairness. The Legislature and the Courts in Wisconsin have created a confusing and tortured picture of who can sue for loss of society and companionship in medical malpractice wrongful death actions.

For most of Wisconsin's history, there was no distinction made between general wrongful death actions and medical malpractice wrongful death actions. The wrongful death statute, Wis. Stat. § 895.04(4), governed who could recover and for how much. According to the Courts, that changed in 1975 when the Legislature created Chapter 655 of the statutes to deal with medical malpractice. However, nothing was changed regarding wrongful death until 1986 when the Legislature passed another medical malpractice bill, which included a $1 million indexed cap on noneconomic damages. The bill defined noneconomic damages to include loss of society and companionship, Wis. Stat. § 893.55(a) and (b).

In the early 1990s, the Wisconsin Supreme Court interpreted these statutes to mean that families of people who died because of medical malpractice should proceed under the medical malpractice statutes, not the general wrongful death statute. *Rineck v. Johnson,* 155 Wis.2d 659, 456 N.W.2d 336 (1990) and *Jelinek v. St. Paul Fire and Casualty Insurance Company,* 182 Wis. 2d 1, 512 N.W.2d 764 (1994).[2]

One issue the Supreme addressed was "whether a minor child has a separate cause of action for loss of society and companionship when medical malpractice causes the death of one parent and the decedent is survived by his or her spouse." *Id.* at 342. The court concluded ch. 655 did not recognize a distinction between injury and death claims, and,

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[1] **Wisconsin**, **Indiana** (§ 34-23-1-1, In. Stats.), **Florida** (§ 768.21(8), Fl. Stats.), **Maine** (Me. St. T. 18-A § 2-804), **Maryland** (Md. Cts. & Jud. Proc.§ 3-904(e)), **New Jersey** (N.J. St. § 2A:31-4), **District of Columbia** (D.C. Code §§ 16-2701, 19-101, 20-701).

[2] The main thrust of *Rineck* was to increase the amount of recovery for loss of society and companionship in medical malpractice wrongful death cases to $1 million, the then-existing noneconomic damage cap. The wrongful death limit in § 895.04(4) at the time was $50,000 for loss of society and companionship.

therefore, surviving children had a separate cause of action, but limited the right to recovery to a child's minority based on the common law.

The Court of Appeals in *Rineck* interpreted the word "child" (§ 655.007) to refer to minor children and therefore only minor children could bring an action for wrongful death in medical malpractice.[3] *Dziadosz v. Zirneski*, 177 Wis. 2d 59, 501 N.W.2d 828 (Wis. App. 1993). The Court of Appeals held that because there was no specific reference to § 895.04, Wis. Stats. in chapter 655, the adult children of the person who died as a result of medical negligence did not have a cause of action as they would have under § 895.04. The *Dziadosz* Court reasoned that *Rineck* eliminated § 895.04 from consideration in any type of medical malpractice wrongful death. The same appears true in the case of a parent suing for wrongful death of an adult child in a medical malpractice action. *Estate of Wells by Jeske v. Mount Sinai Medical Center,* 174 Wis. 2d 503, 497 N.W.2d 779 (Wis. App. 1993) *affirmed* 183 Wis. 2d 666, 515 N.W.2d 705 (Wis.1994).

Health care providers did not like being treated differently than other defendants in wrongful death cases, in that they faced unlimited damages after *Jelinek.* In other words, they wanted to undo the cases of *Rineck* and *Jelinek* and reapply the wrongful death cap under § 895.04(4) — at that time $150,000 — to medical malpractice actions. In 1995, they incorporated this change into a broad medical malpractice bill, 1995 Act 10. It created § 893.55(4)(f) that provided that damages recoverable in medical malpractice wrongful death cases were subject to the $150,000 wrongful death limit on loss of society and companionship.[4]

After the change, the adult children of a single woman, who died as a result of alleged medical malpractice, brought a wrongful death claim for loss of society and companionship.

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[3] Wis. Stat. § 655.007 was adopted in 1975 when chapter 655 was created. It provided, "On and after July 24, 1975, any patient or the patient's representative, having a claim for injury or death on account of malpractice is subject to this chapter." The Legislature amended the statute in 1983 Wisconsin Act 253 by adding the following words after the word claim, "*or any spouse, parent or child of the patient having a derivative claim.*" According to the drafting file the language was added to clarify "who constitutes a representative, stating that a patient's spouse, parent or child who wishes to press a derivative claim concerning an act of malpractice that injured or caused the death of the patient must also seek relief before a panel." There was no discussion of the meaning of the word "child."

[4] Wisconsin Stat. § 893.55(4)(f) provides in pertinent part, "Notwithstanding the limits on noneconomic damages under this subsection, damages recoverable against health care providers . . . acting within the scope of his or her employment and providing health care services, for wrongful death are subject to the limit under s. 895.04(4)."

They tried to convince the Court that the legislative change in 1995 also meant that *who could sue* should also be the same as the general wrongful death statute. The Court did not agree. They held adult children had *no cause of action* for a wrongful death claim when the death was caused by medical malpractice. *Czapinski v. St. Francis Hospital, et al.,* 2000 WI 80, 236 Wis.2d 316, 613 N.W.2d 120.

By this ruling, Wisconsin created a dual tract for wrongful death. One tract allows adult children to pursue a claim for loss of society and companionship under the § 895.04(4), the general wrongful death law. This interpretation was recently upheld in *Pierce v. American Family Mutual Ins. Co.,* 2007 WI App. 152, 736 N.W.2d 247, which concluded that the plain language of § 895.04(4) allows an adult child to recover for loss of society and companionship following the death of a parent. The court wrote, ".... parents commonly refer to their adult offspring as their 'children,' and those parents did not cease to have children when their children reached adulthood."[5]

The second tract does not allow an adult child to pursue a claim for loss of society and companionship under the medical malpractice laws. We believe that is unfair.

As evidenced by testimony today, the current law discriminates against unmarried, divorced and widowed individuals. Most adult children are not dependent on a parent for their livelihood nor are adult children generally responsible for their parents. However, many adult children have close, personal relationships with parents. In fact as many parents know, the most rewarding part of a child/parent relationship often takes place after a child is grown.

Impact of SB 203

Because we are dealing with the subject of medical malpractice, we would like to dispel several concerns about the impact of SB 203.

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[5] While the *Pierce* case came out in 2007, the statute was actually modified in 1986. 1985 Act 130 (March 20, 1986) amended § 895.04(4) to eliminate the words, "unemancipated or dependent" before the word "children. According to the Legislative Reference Bureau analysis the bill made the following changes, "Present law limits recovery for pecuniary injury from wrongful death to the spouse, unemancipated or dependent children or parents of the deceased. This bill allows all persons eligible to bring a wrongful death action to recover damages for pecuniary injury from wrongful death...." By simply using the word "children" the Legislature recognized the right of both adult and minor children to recover for loss of society and companionship.

What is wrongful death?

When someone dies as a result of a negligent act, the surviving family members can bring a claim against the person causing the harm. A wrongful death claim belongs to the survivors—the spouse, parents or children of the deceased. They can recover damages for loss of earnings and other economic damages. It also includes a claim for loss of society and companionship, suffered as a result of the death of their spouse, parent or child. SB 203 bill does nothing to affect the current $350,000 cap on loss of society and companionship in wrongful death cases for adults.

There is some concern that other families suffer tragic losses of family members and they do not sue for monetary damages. So why should one family be compensated for its loss, but another family not be allowed to go to court?

Unequal access to justice is precisely our concern—all Wisconsin families should have the same access to the courtroom when they lose a family member due to the improper action of another person. But under the current law, a family does not have the right to seek justice when they lose the society and companionship of a child over age 18 due to medical malpractice. The family can take the case to court when a doctor causes the death of a married parent, but not a widowed or divorced parent. This double standard makes no moral or logical sense.

A medical malpractice case that results in death is very serious for all involved and family members often want steps taken to prevent the doctor from repeating the same act of negligence against others.

Families resort to court looking for answers and a sense of justice. But under Wisconsin law, the doctor may not face accountability simply based on the age or marital status of the victim. If that doctor were driving drunk and fatally injured a person in the hospital parking lot, no such artificial distinctions would be made.

There is also some concern that relatives with little or no relationship with the person who died, will recover money from a health care provider.

Wisconsin's wrongful death statute is very clear on who can recover for loss of society and companionship: a spouse, parents, children and minor siblings. Wis. Stats. § 845.04(4). The Family Justice Bill does ***not*** expand who can file a claim to more members of the same family—it simply ensures that all families are treated the same way, with the ***same access to the courts***. They want to have the same rights as a person who had a parent or adult child die in a car accident.

The same argument could be made right now in auto accident cases, yet the civil justice system is able to sort this situation out without a problem. The law requires **proof** that family members have suffered a loss of society and companionship. This means that a mother would have to testify about her relationship with a child – how close they were and what their relationship was like. If one could show it was not close, there might be no recovery. But if there were a close relationship between the two that would demonstrate the loss suffered. A jury would make the final decision of whether damages should be awarded.

Isn't it true that the person's estate can sue for pain and suffering even when a child over age 18 or a single parent dies as a result of medical malpractice?"

That legal option route is open in only some cases. The person who died must be shown to have been ***conscious*** while the pain and suffering was inflicted. If the person was ***unconscious*** or under the effects of anesthesia, there is no grounds for such a legal action. Moreover, only the estate of the victim—not the surviving family members—can bring a legal action.

Isn't better doctor discipline the answer?

WAJ would certainly welcome better doctor discipline, but it is not a substitute for the civil justice system. The civil justice system and the disciplinary system should be considered complementary and not duplicative. Each serves its own function. The medical disciplinary process is designed to serve the public at large. A strong disciplinary system is necessary to set standards for licensure, hold providers accountable for other activities that may not come under the legal system, and protect the public from providers who pose a danger to society.

The civil justice system is needed to hold health care providers accountable for injuries caused by their carelessness. That accountability includes paying injured patients and

their families for the harm done to them. This means individuals need access to the courts to uphold their rights. Right now access to the courts is being denied to numerous individuals and the Legislature needs to address that important issue through the Family Justice Bill.

In Wisconsin the Medical Examining Board has compiled a record that clearly indicates major improvement is needed before it can be considered fair or effective:

- According to Public Citizen, Wisconsin ranks ***49th*** in the rate of discipline for doctors in the U.S. in 2008 with 25 serious actions out of 17,295 physicians.
- The MEB actually imposes discipline in less than one out of 10 complaints; ***over 90% are dismissed*** without any sanctions.

For example, an adult son filed a complaint with the MEB after his father died of a heart attack because the hospital failed to transport him in a timely manner. The Department of Regulation and Licensing staff investigated the complaint and found there was a delay in transporting, but they also learned an even more disturbing fact. The father was given the wrong drug, which worsened his condition and may have played a part in his death. However, despite all this evidence, the MEB dismissed the complaint against the doctor. While the DRL investigator found the doctor acted carelessly, the MEB chose not to act; basically saying the doctor's conduct was acceptable even though someone needlessly died.

This is not an unusual occurrence. A March 2000, *New York Daily News* week-long investigative series found that "hundreds of New York State doctors, dentists and podiatrists — ranging from modest practitioners to prominent surgeons — have amassed extensive hidden histories of malpractice yet continue to treat patients." The story said, "The effect of failing to crackdown on the tiny percentage of doctors with the worst malpractice records is stunning, because they are a powerful driving force behind medical misfeasance nationwide." According to Public Citizen, 5% of doctors account for 54% of all malpractice payments.

Won't the passage of the Family Justice Bill increase the number of malpractice lawsuits and the cost of health care?

This issue is actually about ***equal rights for all families, not economics.*** Data indicate that there is a huge volume of deaths and serious injuries caused by medical errors. A

HealthGrades study estimated that up to 250,000 Americans die each year due to hospital errors.[6] That is 478 jumbo jets full of people dying each year because of preventable medical errors. At least 1.5 million Americans are sickened, injured and killed each year by avoidable errors in prescribing, dispensing and taking medications, according to the Institute of Medicine (IOM).[7] The extra medical costs of treating drug-related injuries occurring only in hospitals was estimated conservatively to be $3.5 billion a year.

Despite these numbers, only 148 medical negligence claims were filed in 2008 in Wisconsin with the Medical Mediation Panels and of that number only 139 malpractice claims were filed in circuit courts. The number of filings was the lowest since 1997.

Wrongful death cases are a small subset of all medical malpractice cases filed. Below is a chart indicating the number of requests for mediation filed in a given year, the number of requests and the percentage that involved a claim for wrongful death.

Year	# Requests for Mediation	# of Wrongful Death Claims	Percentage
1997	240	39	16%
1998	302	57	19%
1999	309	77	25%
2000	280	59	21%
2001	249	39	16%
2002	264	55	21%
2003	247	45	18%
2004	240	33	14%
2005	223	46	21%
2006	236	42	18%
2007	183	22	12%
2008	148	19	13%
Total	2921	533	16.5%

Source: Randy Sproule, Administrator, Medical Mediation Panels.

In 2008, out of the 148 requests for mediation, only 19 dealt with wrongful death claims. The numbers of requests for mediation in wrongful death cases are small and relatively stable — ranging from 12 percent to 25 percent and averaging 16.5 percent a year. Allowing adult children and the parents of adult children in medical malpractice cases to bring a wrongful death claim makes sure any person who is injured by the misconduct and negligence of others can get justice in the courtroom. We believe access to justice and accountability is an important right for all Wisconsin citizens.

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[6] HealthGrades Quality Study, Third Annual Patient Safety in American Hospitals Study, April 2006.
[7] *Preventing Medication Errors,* Institute of Medicine, National Academy of Science, July 20, 2006.

Because of the limited number of claimants, allegations that AB 291 will lead to higher health care costs are speculative and against the great weight of evidence. Below is a chart that shows medical malpractice costs as a percentage of health care expenditures has decreased in Wisconsin from a high of 1.17 percent in 1989 to just .337 percent of health care expenditures in 2007. In 2007, malpractice expenses — paid losses, costs of defending claims, insurance company overhead and profits — amounted to less than 34 cents for every $100 dollars spent on health care.

Year	Medical Malpractice Direct Premiums Earned (000s omitted)			Total Health Care Expenditures in Wisconsin (000s omitted)**	Medical Malpractice as a Percentage of Health Care Costs
	Private Insurers (OCI)*	Pat. Comp. Fund*	Insurers & Fund		
2007	$102,618	$24,075	$126,693	$37,577,000	.337%
1989	$74,900	$43,161	$118,061	$10,114,000	1.17%

*From the Wisconsin Insurance Report, Office of the Commissioner of Insurance, years 1987-2007.
**From http://www.cms.hhs.gov/NationalHealthExpendData/downloads/nhestatesummary2004.pdf. Year 2007 is based on a projected growth of 6.7%. http://www.cms.hhs.gov/NationalHealthExpendData/Downloads/proj2007.pdf.

Finally, the bill will have a minimal effect on malpractice insurers. We need only look back to 1998 when the wrongful death limit was raised from $150,000 to $350,000 for adults and $500,000 for children.[8] As the chart above shows, neither primary insurers nor the Injured Patients and Families Compensation Fund (the Fund) increased insurance rates for doctors. In fact, Physicians Insurance Company of Wisconsin, which covers about 40 percent of all the doctors in Wisconsin, decreased its rates by 2.8% on January 1, 1999 and another 8.6% on January 1, 2000.

Conclusion

Under the current law, many families are left with no remedy when an unmarried, widowed or divorced family member dies as a result of medical malpractice. Why should individuals without minor children who die due to alleged medical negligence have their relationships with family members devalued under the law? The changing demographics in

[8] The Legislature also amended § 895.04 (4), Wis. Stats., broadening who can bring a claim for wrongful death by including siblings of the deceased, if the siblings were minors at the time of the death.

the United States really show how demeaning this idea is. In the 2000 U.S. Census, 27.1 percent of all people were never married. Another 16.3 percent were widowed (6.6%) or divorced (9.7%). If one looks at particularly vulnerable age groups, like young adults ages 20-24 years, 94.1 percent of women and 95.8 percent of men are not married. For people from age 65-74 years, 8.3 percent of men and 30.8 percent of women are widowed. This only increased from ages 75-84 years when 18.2 percent of men and 54.6 percent of women are widowed. In addition, over 21 million adults live in a home with one or both parents.

There is simply no good reason the personal rights of companionship of the parent-child relationship are given less protection in cases involving adult children. Wisconsin's wrongful death statute recognizes the valuable relationship parents can have with adult children, and it is time this concept be carried over to the medical malpractice arena. It makes no sense to tell adult children whose widowed parent dies in an automobile accident they have a claim, but if they die due to medical negligence they have no right to pursue justice. The law is absurd. Changing the law would send an important message: The citizens of Wisconsin value the relationship between *all* adult children and their parents.

In the case of medical malpractice, often there is a lot of uncertainty. Sometimes a lawsuit is needed to discover the truth. Families need to be able to go to court and find out what happened to cause a loved one's death. As attorneys, we are committed to strengthening the civil justice system so that deserving individuals can get justice and wrongdoers are held accountable. All Americans benefit when the individuals have a fair chance to get justice through our civil justice system.

We urge passage of Senate Bill 203. Restore fairness to families who have suffered the ultimate loss of a loved one due to medical negligence.

WISCONSIN ASSOCIATION *for* JUSTICE

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WISCONSIN STATE SENATE
COMMITTEE ON JUDICIARY, CORRECTIONS, INSURANCE, CAMPAIGN FINANCE REFORM AND HOUSING
SENATOR LENA TAYLOR, CHAIR

PUBLIC HEARING ON
SENATE BILL 127
AUGUST 18, 2009

TESTIMONY OF
MARK L. THOMSEN
ON BEHALF OF THE
WISCONSIN ASSOCIATION FOR JUSTICE

Senator Taylor and members of the Committee, my name is Mark L. Thomsen. I am a shareholder in Cannon & Dunphy Law Firm in Brookfield, WI. I currently serve as President of the Wisconsin Association for Justice (WAJ), formerly the Wisconsin Academy of Trial Lawyers. I thank you for the opportunity to appear today to testify in support of Senate Bill 127.

WAJ is established as a voluntary trial bar, a non-profit corporation with approximately 1,000 members located throughout the state. The objectives and goals of WAJ are the preservation of the civil jury trial system, the improvement of the administration of justice, the provision of facts and information for legislative action, and the training of lawyers in all fields and phases of advocacy.

Under current law, injured patients and their families must notify the state or other governmental body of a potential malpractice claim within 180-days if they were treated by physicians or other health care professionals at a

health facility operated by a governmental body, i.e., UW Hospital & Clinics or UW Health/Physicians Plus, and medical malpractice results in injury or death to a family member. Privately run health systems are subject to a 3-year statute of limitations for the same claims.[1]

Senate Bill 126 eliminates the 180-day notice requirement for medical malpractice claims filed against doctors who are government employees under Wis. Stat. § 893.82 and § 893.80.

In medical malpractice cases, the 180-day notice requirement is particularly harsh. It takes many patients longer than six months to recover before they even begin to think about contacting a lawyer. There can also be difficulty in getting the patient's records. It can take months to receive the patient's medical records, which leaves little time to properly evaluate the potential malpractice claim. Having to explain this harsh rule to families is one of the saddest situations our members, who represent injured consumers, confront.

Here in Dane County, there is a confusing maze of coverages, which can lead to a trap for the unwary. In 1995 the UW Hospital became an "Authority" and is no longer state-owned. However, the physicians practicing at the UW Hospital remain state employees and are covered by the 180-day notice requirement. Second, the 200 doctors of Physicians Plus Medical Group merged with UW Medical Foundation on February 1, 1998, and became state employees. This means patients with a potential claim have less time to file a medical malpractice action against a Physicians Plus doctor.

An additional wrinkle was just added to the mix, when the Wisconsin Supreme Court ruled in *Rouse v. Theda Clark Medical Center Inc., et al.* 2007 WI 87, that the University of Wisconsin Hospital and Clinic Authority (UWHCA) is a "political corporation" under Wis. Stat. § 893.80 and claimants are subject to the 180-day notice provisions in that statute. This means that residents and other Authority employees (e.g. nurses or pharmacists) fall under Wis. Stat. § 893.80, not § 893.82. This creates a dangerous maze for the unwary. How does one know if they are seeing a resident or a doctor?

[1] Injured minors are subject to a longer statute of limitation under Wis. Stat. § 893.56.

As a patient, trying to sort out this quagmire is very difficult, especially within 180 days. It is a situation wrought with confusion both for the patient and attorney. Patients have no idea when they are being treated, who's a state employee, who's an Authority employee or who isn't. Often this cannot be determined until there is discovery. Patients shouldn't be penalized by losing their right to proceed in court for failure to navigate through this quagmire in 180 days.

In addition, the bill applies the same $250,000 cap on all damages for health care providers under § 893.80 as under § 893.82. Currently, there is $50,000 cap under § 893.80. This amount is so low it is virtually impossible to bring a case against an employee of the UW Authority.

Wisconsin families should be afforded fair and equal protection under the law, regardless of which hospital or doctor used. We urge passage of Senate Bill 127.

WISCONSIN CIVIL JUSTICE COUNCIL, INC.

Promoting Fairness and Equity in Wisconsin's Civil Justice System

TO: Members, Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing
FROM: Andrew Cook, on behalf of the Wisconsin Civil Justice Council, Inc.
DATE: August 18, 2009
RE: **OPPOSITION TO SENATE BILL 203**

The Wisconsin Civil Justice Council respectfully requests your opposition to Senate Bill 203, which allows recovery between adult children and their parents for loss of society and companionship in medical malpractice cases.

Loss of society and companionship in medical malpractice cases was never part of the common law but is a creature of statute. In fact, the Wisconsin Legislature has very carefully and thoughtfully limited recovery to spouses, minor siblings and minor children and their parents. Wisconsin law allows plaintiffs to be compensated for all expenses that can be measured by objective standards. For example, families can be compensated for medical bills, lost wages, loss of earning capacity, funeral expenses, pain and suffering and punitive damages.

In past debates over similar proposed legislation, proponents have argued that the legislation is needed because of a misinterpretation (by the Wisconsin Supreme Court) of the statute rather than a "conscious decision" made by the Legislature. However, during the 1997-98 legislative session the issue was openly discussed and debated. Further, the Supreme Court pointed out in *Czapinski v. St. Francis Hospital, Inc.* 236 Wis.2d 316, 613 N.W.2d 120 (2000), that the Senate rejected an amendment which would have defined "child" in Wis. Stat. § 655.007 to include adult or minor child.

Loss of society and companionship is impossible to measure objectively. No amount of money can replace the companionship that could have been shared with a loved one. Moreover, there is no established societal need to compensate an adult child or parent in medical malpractice cases. Wisconsin has chosen to allow such recovery in the limited circumstances referred to above. While the entire concept of allowing recovery for loss of society and companionship is debatable, the Wisconsin Legislature should be commended for limiting those eligible to recover. If this legislation is enacted, where might we go next? (Grandparents, cousins, significant others, close friends, or even associates?)

In conclusion, the WCJC respectfully urges you to oppose SB 203 and avoid encouraging additional difficult and costly litigation.

[The Wisconsin Civil Justice Council is comprised of a number of associations and businesses. The WCJC's primary goal is to achieve fairness and equity in the civil justice system, reduce costs, and enhance Wisconsin's image as a place to live and work.]

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CITIZEN
ACTION
OF WISCONSIN

Testimony of Robert Kraig, Program Director
Citizen Action of Wisconsin
Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing
Senate Bill 203 (Family Justice Bill)
August 18, 2009

Thank for the opportunity to share Citizen Action of Wisconsin's position on this critical issue of fundamental justice.

The current state of Wisconsin law closes the courtroom doors to families with who have suffered the loss of a family member due to apparent medical negligence if the family member was an unmarried childless adult child or a parent who was widowed, divorced or unmarried. Under current law, Wisconsin is one of just seven states that prohibits wrongful death claims from being filed by the parents of children over 18 years of age who die due to medical negligence. It also blocks wrongful death claims by the adult children of widowed, divorced or single parents who die as a result of medical malpractice.

These loopholes so defy logic and the reality of human relationships that many people have trouble believing that a progressive state like Wisconsin allows such rules to remain standing. These arbitrary and artificial distinctions based on age and marital classifications bear no relationship to the actual suffering created by medical negligence.

So the victim's family is victimized again. They find themselves unable to get answers, unable to achieve a sense that justice has prevailed, and unable to feel that they have done right by the loved one they have lost. Having heard the painful stories these families have shared, I can assure that

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their motives are neither venal nor vengeful. These families simply want justice and accountability.

We are not here to demonize doctors, the overwhelming majority of whom are careful and conscientious. In fact, we have share the same philosophy outlined by Dr. Bruce Kraus, representing the Medical Society in testimony before a legislative committee on Jan. 19, 1995:

"Claims against physicians should not be treated any differently than claims resulting from automobile accidents or against any individual."

However, the current law creates a double standard: if a doctor were negligent on the highway, he or she would be held accountable for any needless loss of life. But when a doctor is negligent on the operating table, many Wisconsin families have no means of seeking justice and accountability.

Passage of the Family Justice Bill would put an end to the double standard and reopen the doorway to justice. That is all we seek: fairness, accountability, and justice.

	Fact Situation	Current Law
Loss of Child in Medical Malpractice Case	If child is under age 18 . . .	Parents may bring a claim for loss of society and companionship
	If child is age 18 or over . . .	Parents may not bring a claim for loss of society and companionship
Loss of Parent in Medical Malpractice Case	If parent is married with no minor children . . .	Surviving spouse may bring a claim for loss of society and companionship
	If parent is unmarried, widowed, divorced with no minor children . . .	No family member may bring a claim for loss of society and companionship
Negligence by Doctor	If behind the wheel of a car . . .	Subject to same accountability as other members of society
	In operating room . . .	Exempt from accountability in cases of adult children and parents without spouses or minor children

Wisconsin Medical Society

Your Doctor. Your Health.

TO: Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform and Housing

FROM: Mark Grapentine, JD – Senior Vice President, Government Relations

DATE: August 18, 2009

RE: Opposition to Senate Bill 203

On behalf of nearly 12,500 members statewide, the Wisconsin Medical Society thanks you for this opportunity to register our opposition to Senate Bill 203.

Negligence in the practice of medicine, or any other health care profession, that causes injury or death is a heartbreaking and regrettable event whenever it occurs. Medical negligence does occasionally occur; when it does, those injured should be reasonably compensated for their loss. Wisconsin has created a special system to govern compensation of those injured by medical negligence through the wisdom of open public debate and bipartisan legislative compromise. It is a system that balances two important and competing interests: reasonable recovery for the few injured by medical negligence versus affordability of health care for the many.

Wisconsin's Medical Liability Climate Attracts Physicians

Wisconsin physicians are heralded for providing some of the nation's highest-quality health care – indeed, the most recent state rankings from the federal Agency for Healthcare Research and Quality (AHRQ) has Wisconsin ranked first in the nation. Despite our size, Wisconsin is a destination state for physicians; this is due in part to our relatively stable medical liability climate, which attracts physicians from other states. The American Medical Association consistently rated Wisconsin as one of just a handful of states considered not to be in a medical liability crisis or near-crisis. Affordable medical liability insurance is one factor in this ranking, and the umbrella insurance Injured Patients and Families Compensation Fund (Fund) undeniably helps make medical liability insurance affordable for Wisconsin physicians.

The Fund covers every dollar of unlimited economic damages above a physician's mandated primary insurance coverage of $1 million per occurrance/$3 million total per year, yet this costs taxpayers zero dollars. Every dollar awarded in a medical liability case – and even the costs the Office of the Commissioner of Insurance (OCI) bears to administer the Fund – are paid for via fees assessed on physicians, hospitals and certain nurses. The Fund is unique in the nation; no other state requires physicians to pay into an umbrella insurance coverage fund with the possibility of unlimited economic damages.

IPFCF Fiscal Status Jeopardized

Unfortunately, the Fund's fiscal stability is endangered. In October 2007 the long-delayed 2007-09 state biennial budget included a $200 million "transfer" from the Fund to backfill General Purpose Revenue (GPR) for the state's Medicaid program. In our opinion, it is no coincidence that the Fund is now in an actuarial deficit, prompting the Office of the Commissioner of Insurance to propose increasing the fees for Fund participants. On July 1, 2009, a 9.9 percent Fund fee increase went into effect.

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These deficits are due in part to the Supreme Court's 2005 action removing the cap on non-economic damages that had been in place – the LFB reports that the Fund calculated the Supreme Court's action as increasing potential loss liabilities by $173,000,000 (according to Legislative Fiscal Bureau Paper 377 from the 2007-09 budget). While the Legislature enacted a new, higher $750,000 cap on non-economic damages that took effect in 2006, it is indisputable that the Fund faces greater liabilities than was planned for in early 2005.

Because of this fiscal situation, it is not the time to further increase the Fund's liabilities by adding new potential claims as contained in Assembly Bill 291. If this proposed legislation is enacted, potential liability exposure will increase, and insurance rates for physicians, hospitals, clinics and many other health care professionals will therefore rise. This bill will upset the delicate balance achieved through bipartisan legislative efforts over the past three decades.

Alternative: Better Physician-Patient/Family Communication
Instead of increasing the Fund's potential liabilities, physicians wish to enact laws that will foster better communication between a physician and a patient's family when a negative outcome occurs. Physicians understand that sometimes family members feel driven to file a lawsuit when they feel that answers about "what happened" are not provided to their satisfaction. This is an unfortunate byproduct of the litigation environment – oftentimes, physicians are advised by their legal counsel not to communicate with patients or their families following a negative outcome due to the fear those conversations could become evidence in a future lawsuit. To remedy this problem, physicians supported so-called "I'm Sorry" legislation (2005 Assembly Bill 1021) to allow physicians to express sentiment of apology or condolence without fear of increasing liability exposure. Unfortunately, Governor Doyle vetoed the bill.

Alternative: "Peer Review"
Physicians also support stronger "peer review" laws, which would foster frank internal discussions at a hospital or clinic following a negative event and allow facilities to implement quality improvement activities that would be confidential and privileged. Peer review can prevent negative outcomes before they happen by identifying and improving individual or system procedures. Physicians supported a bill two sessions ago (2005 Senate Bill 578) that accomplished these goals, and the Legislature passed the bill by voice vote in the Assembly and a 29-3 Senate vote. Unfortunately, Governor Doyle vetoed the bill.

The stories of those who have lost loved ones as a result of medical negligence are heart wrenching. However, good social policy is sometimes difficult. The creation of Chapter 655 and its subsequent amendments reflect the conscious decisions of a legislature seeking a balance between the desires of those who are injured by medical negligence and the many who need affordable health care. This balance has worked well since the creation of Chapter 655 and should not be disrupted.

Health care resources in our country and in Wisconsin are limited. The State Legislature and our courts have recognized the necessity of reasonable limits for non-economic damage recovery in medical liability actions. In Wisconsin, we have done this in a bipartisan fashion and the result is Chapter 655. We urge you to continue to appropriately maintain this balance and oppose Senate Bill 203.

Thank you again for this opportunity. If you have any questions on this or any other issue, please feel free to contact me at any time.

Senate Bill 203 – Relevant Cases

In re Wells v. Mt. Sinai Med. Ctr., 183 Wis. 2d 667, 515 N.W.2d 705 (1994)

Justice Jon Wilcox writing for a 6-1 majority, after citing a long line of case law where the courts have ruled that drawing a clear line regarding liability exposure is necessary:

> Of these public policy considerations, those concerned with the imposition of excessive liability are particularly germane to claims for lost society and companionship. That is because the plaintiff's recovery in such cases is predicated upon the emotional ties he or she shares with the injured party. Consequently, the possible universe of claimants is limited only by the number of persons with whom the injured person has established personal relationships. Moreover, the negligent tortfeasor in such cases faces the considerable burden of disproving the existence and/or significance of any such relationships. As a result, courts generally recognize that this particular cause of action necessitates some degree of judicial guidance. (Wells at 675-76)

> [S]ound public policy dictates that some limit be placed on the liability faced by negligent tortfeasors. . . . To hold that same tortfeasor potentially liable to the parents (both parents, when applicable, could presumably bring separate claims) for the loss of an adult victim's society and companionship is, we believe, excessive and contrary to public policy. (Wells at 677-78)

> Limiting recovery for reasons of public policy always runs the risk of working harsh results in individual cases. For instance, people may question the logic which denies recovery to the parent of an 18 year old, but allows recovery for the parent of a 17 year old. . . . [Is] such line-drawing an indication by the legislature or this court that the parental relationships in the first instances are less significant than in the second? Of course not. But given the compelling public policy concerns in this area, a line at which liability ends must be drawn. We believe that the age of majority represents a rational place to draw that line. (Wells at 680-81)

Czapinski v. St. Francis Hospital, Inc., 236 Wis. 2d 316, 613 N.W.2d 120 (2000)

Justice Crooks, writing for a unanimous court, described a number of reasons why recovery in medical liability cases – including the ability for adult children to recover for loss of society and companionship of a parent – can be limited:

> Possible justifications . . . include the prevention of, *inter alia*, a sudden increase in the number of malpractice suits, increased medical costs or decreased accessibility to health care. Furthermore, the distinction between the adult child and minor children could be the different degree of

dependency which each would be presumed to have on their parents for their continued financial and emotional support. Minor children rely much more heavily on their parents for financial and emotional support than do adult children, and this difference is substantial. Faced with the need to draw the line on who can collect for loss of society and companionship, we follow the view established by this, and other Wisconsin courts, that the availability of claims for loss of society and companionship should be limited to those who would suffer most severely from the loss of an intimate family relationship; adult children cannot be included in this classification. . . .

For the foregoing reasons, the classifications of tortfeasors and tort victims are not arbitrary or irrational, but are based on reasonable and rational criteria. (Czapinski at ¶¶ 31-32, citations and internal quotations removed)

STATE REPRESENTATIVE
JON RICHARDS
WISCONSIN STATE ASSEMBLY

Family Justice Bill
Senate Bill 203
Testimony for the Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform and Housing
August 18, 2009

It is tragic when family members face the loss of a loved one, especially due to the negligence of another person. There is a difference that exists in Wisconsin law however, between the recourse that certain family members can seek depending on whether negligence was medically related or caused in any other kind of accident. Wisconsin is one of only six states, and the District of Columbia, that does not extend the right to seek claims for loss of society and companionship to adult children of unwed, divorced or widowed parents or to parents of unwed and childless adult children.

The Family Justice Bill that Senator Jeff Plale and I introduced will grant family members the right to compensation after death or injury to a loved one due to medical malpractice. This legislation has been introduced every session since 1999, and because of senseless partisanship, has stalled before final passage. This bill will allow all children of an unmarried parent and all parents of unmarried children to seek claims for loss of society and companionship against doctors and other medical professionals whose negligence resulted in the death of the patient.

If a death occurs because any person, including a doctor, was negligent behind the wheel of a car, then the relatives of the victim can seek a claim for loss of society and companionship. If that same doctor is negligent while practicing medicine and causes the death of a patient, then only certain relatives may seek a claim, leaving some victims without any way of seeking justice.

The medical malpractice laws that have been in place for decades have helped offer a modicum of comfort in the form of financial support to some families affected by the death or injury of a patient caused by the negligence of a medical caretaker. Unfortunately, there are people who are directly affected by the loss of a loved one who can not be made whole.

Senator Jeff Plale and I have both heard stories from constituents who had no recourse when their parent or child was wrongly injured or killed during medical treatment. I'm sure many of you have heard similar stories. One such story, about Erin Rice and her parents, Eric and Linda Rice, has been reported on many times over the last 10 years as an example of why we need to pass the Family Justice Bill.

Erin was 20 years old in 1999 when her parents brought her to their HMO because she was coughing, had shortness of breath and was nauseous. The HMO sent her to the

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HOME 1823 North Oakland Avenue, Milwaukee, WI 53202
WEBSITE www.jonrichards.org

Emergency Room, and even though x-rays showed that Erin had an enlarged heart, which her parents learned later, she was diagnosed with bacterial pneumonia and sent home. Erin was subsequently given Compazine for her nausea twice, once by the HMO and once by the Emergency Room on another visit, when she continued to feel her symptoms. Her parents later learned that Compazine cannot be used by someone who is in heart failure. By the time an echocardiogram was performed, twelve days after her initial visit, she was found to have been suffering from cardiomyopathy and was in heart failure.

Erin had an 80% chance of surviving if she had been correctly diagnosed on her first visit, but she instead passed away two weeks after the initial misdiagnosis. Because Erin was 20, was not married, and had no children of her own, her parents had no claim of loss of society and companionship to make against the medical professionals who had failed their daughter multiple times.

I have the highest respect for the medical professionals in Wisconsin. We are blessed with some of the highest quality health care in the world because of the truly talented doctors and nurses who practice here. But even the best of us make mistakes. In the medical world, the result of a mistake can be the loss of function of an organ, the loss of a limb or the loss of a life. Money itself can never replace an organ, a limb or a life, but it can provide some measure of justice and help with the real financial burdens families can face because of a medical error.

You are surrounded today by families from across Wisconsin who have suffered through the loss of a loved one and who have not had an avenue of compensation for their loss, nor have they had a chance to hold the negligent doctors accountable. The Family Justice Bill will help future families faced with an unspeakable loss.

WISCONSIN® LAWYERS
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MEMORANDUM

To: Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing

From: Douglas W. Kammer, President
State Bar of Wisconsin

Date: August 18, 2009

Re: State Bar of Wisconsin Support for Senate Bill 203 -- Family Justice Bill

The State Bar of Wisconsin supports Senate Bill 203 because it would open our civil justice system to families whose loved ones die at the hands of negligent medical professionals.

Current law does not allow a parent to recover for loss of society and companionship if the parent's adult child dies as the result of medical malpractice. Similarly, an adult child cannot recover for loss of society and companionship if the adult child's parent dies as the result of medical malpractice. Under SB 203, both the parent and the adult child would be allowed to recover in these situations.

Oddly enough, current law allows an adult child to bring a claim for loss of society and companionship when a parent is killed by a driver who failed to yield the right of way under the wrongful death statute, § 895.04 (4), Wis. Stats. However, that same adult child would not be able to sue for loss of society and companionship if a parent dies on the operating table because a physician botches a surgery.

Senate Bill 203 is about fairness and accountability. It will make the law more consistent as to who can recover and will ensure that a negligent health care provider can be held accountable when a family loses a loved one due to that provider's negligence.

The State Bar of Wisconsin strongly urges you to support SB 203.

If you have any questions, please feel free to contact Adam Korbitz at (608) 250-6140, Government Relations Coordinator for the State Bar of Wisconsin.

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Testimony of

Dr. Eric E. Rice
CEO, ORBITEC
Madison, WI

In Support of the
WISCONSIN FAMILY JUSTICE BILL (SB-203)
August 18, 2009

Mr. Chairman and Committee Members, it continues to be very difficult for me to speak to you regarding this most important bill, now given the number – SB-203. We have been trying to get this bill passed for 7 or 8 years now -- it is time we finally do it!!

Over ten years ago, Linda and I lost our youngest daughter, Erin Elisabeth Rice, a 20-year old graduate of Middleton High School, because of medical malpractice by GHC and UW Hospital. Because of Wisconsin's law we could not bring a loss of society claim against the people that literally killed our daughter. I can verify that loosing a child is the most devastating event possible in your life and it never goes away. As I speak, try to put yourselves in our situation. The reason why I'm here to talk to you and fight for law repair today is that only you lawmakers, the victims, their families and close personal friends know about the problem of the flawed Wisconsin Laws; the general public in this state does not have a clue. The Medical Society, doctors and the insurance lobbies know about the flawed laws and continue to fight the fix.

On April 19, 1999 our family was devastated, when our youngest child (then 20) passed away from a battle with viral cardiomyopathy. On April 5th my wife Linda took our Daughter Erin to our then GHC health care provider, after Erin showed symptoms of cough, SOB and stomach upset. The doctor there sent Erin to the Emergency Room of UW Hospital, voicing concern that Erin had a potentially serious condition involving the heart or lungs, as he measured a very low blood pressure. The Emergency Room doctor, after many long hours of testing, including EKG and X-rays, diagnosed our Daughter with bacterial pneumonia and put her on antibiotics and sent her home. However, UW radiologist and UW cardioligist reports indicated otherwise – but they did not call us as they were obliged to by the discharge papers. UW Hospital sent a report back to GHC and the GHC Doctor was so busy that he just initialed the report and sent it on to be filed – he later admitted that he never read it. He also later admitted that had he done so, he would have had her immediately admitted to the hospital in the care of a cardiologist. Erin continued to have stomach problems, some swelling in the groin area and cough. We returned to the GHC and the doctor prescribed Compazine, a nausea medication (not to be used by someone in heart failure). He looked for the report, but could not find it. He admitted he sent her home not knowing what was going on. He even thought she might have parasites. Her condition deeply worsened probably because of the compazine and Linda took Erin back to the UW Emergency Room early on the morning of April 17th with dry heaves and she immediately was given more Compazine for her stomach nausea. However, this time they performed an echocardiogram and declared that she was in critical condition and in heart failure with vital cardiomyopathy. They now told us that she had an enlarged heart and that

her heart was only pumping with less than a 10% heart ejection fraction (~60% is normal). She went into multiple organ failure and died on April 19th. The doctors said there was nothing they could do to save her. There were heart assist devices available at that time, but they declined to inform us of their life-saving capability!

Well the grieving began that day and continues ten years later -- it has been absolutely devastating for my wife Linda and me, our other three children and Erin's dearest friends. It took me quite some time to gain a copy of her medical records, seems the records went back to the ER for extended review. After I got them, I noted that an enlarged heart was noted on the record April 5th. The x-rays showed a significant heart enlargement (65% of chest cavity -- normal is 25%) on April 5th – we nor Erin were ever told this until April 17th.

I began seeking legal and professional medical expert opinions regarding Erin's death and medical record. That review showed, through three independent expert reviews, that the medical diagnosis on April 5th was grossly in error and not normal expected practice. The EKG record showed heart muscle failure [no R-wave] – the EKG was grossly abnormal. Her x-rays showed heart failure, a very enlarged heart, lung compression due to the large heart, and no evidence of bacterial pneumonia. An echo cardiogram needed to be taken and was not. Compazine should have never been given to her. Other findings have indicated that Erin would have had at least an 80 % chance of survival on April 5th had the correct diagnosis and proper treatment been made. I could speak for hours on what medical errors and omissions occurred, but I do not have the time today.

Family Injustice

Currently, if you're single son or daughter is 18 or older and experiences medical malpractice and dies in Wisconsin that you, as a parent or sibling, will not be able to bring a claim for wrongful death against the wrong doers. Also, if your single parent experiences medical malpractice and dies as a result in Wisconsin, that you as an adult child of that parent will not be able to bring a claim for wrongful death against the wrong doers. You will never find out what really happened, you will never get accountability, and you and your family will never see justice or accountability. Currently the law discriminates against two classes of people, single young and single elderly.

What is wrong? It seems that the health care and insurance company lobbyists and contributors worked their magic in the Wisconsin State Legislature in 1995 by sneaking in some language that was made into law, without the any public understanding or awareness. In this time of "family values", it is totally unbelievable that Wisconsin law does not recognize the life-long bond between parent and child, regardless of the child's or parent's age and regardless of whether the parent is widowed or divorced. Up till now, the state law has been based on the bottom-line values of the health care providers, insurance companies, and manufacturers and other big campaign contributors, not the family values held by the majority of Wisconsin citizens.

Wisconsin, of all states, you would think would be supportive of its citizen's rights. Not so. Six other states/districts in the US also have discriminating laws like this one, namely, Indiana, Florida, Maine, New Jersey, Maryland, and DC. Victims in these states are also fighting to change the law there to allow equality under the law. Forty-four do not discriminate!

Wisconsin Family Justice Network

Wisconsin families who have suffered the loss of a family member due to apparent medical negligence have found the courthouse door slammed shut in their faces. In response, they have formed the Wisconsin Family Justice Network (WFJN). We continue to fight on for repair of the law.

A group of Wisconsin families who suffered the loss of a family member due to apparent medical negligence have been fighting to change the Wisconsin law back to what it was prior to 1995. We are a small group of families who now understand what the law means. The rest of the public still doesn't understand. We have few resources, but we must get the message out to the unsuspecting public, voters, media, and work with the legislators to get the law changed! The current WFJN members, their home towns, and their victimized family member are:

Jeanine & Lauren Knox
Milwaukee (mother)

Stephanie O'Connell
Green Bay (father)

Roger Fransway
Chippewa Falls (sister)

Jim & Donna Harvey
Waterford (mother)

Sherry Ellis
Oak Creek (mother)

Bernice Watts
Brown Deer (daughter)

Sandy Gunwaldt
New Berlin (mother)

Dan & Kim Leister
Mukwonago (daughter)

Lonny & Rhonda Brown
Chippewa Falls (son)

Willie Davis
Milwaukee (mother)

John Zachar
Greendale (mother)

Judy Demeuse
Colgate (father)

Carolyn Walasek
Park Falls (mother)

Helen Szurovecz
Milwaukee (mother)

Pam Vertanen
Manitowoc (mother)

Susan Czapinski
Madison (mother)

Patty Schey
Wauwatosa (father)

Steve Janasik
Park Falls (mother)

Harriet Yancey
Milwaukee (father)

Sheryl Holdmann
Muskego (mother)

Jake Budrick
Saukville (mother)

Lee Davis
Menomonee Falls (brother)

Ray & Betty Lange
Beaver Dam (son)

Rosemary Halvorson
Readstown (mother)

Peter Torgerson
Colfax (mother)

Anita Harris
Milwaukee (son)

James & Dottie Webb
Whitewater (daughter)

Eric & Linda Rice
Middleton (daughter)

Dimitri Jordan
Milwaukee (mother)

James Bollig
Cottage Grove (father)

Sharon Kind
West Bend (mother)

Jonna Fedie
Hammond (mother)

Mary McBride
Madison (father)

homes. But, malpractice costs are about one-half of one percent of all medical costs, so the claims of skyrocketing medical costs were plain ridiculous. 44 other states allow all families to have legal rights in malpractice cases, and they have not suffered any loss of doctors willing to practice.

Private malpractice insurance carriers are very healthy. The loss ratios for malpractice insurers from 1995 to 2000 are very low. During this period, the average loss ratio is 18. That is only 18¢ of every dollar the insurance company estimates it will pay on all malpractice claims. In addition, private physicians are compelled by state law to pay into the patient's medical compensation fund every year (roughly $30 to 55M per year). The fund now has grown to a value approaching $1B. Because it is so big, the Governor and others still wants to take some of this surplus to help the state's budget problems. These insurance rates should be going down! But they are not – why??

The Wisconsin Family Justice Network suggests that once you, as a representative of the people of this great State of Wisconsin, honestly consider the thoughts below that you will be compelled to support and sign on as a co-sponsor of the Wisconsin Family Justice Bill.

- Do you believe that the bond between you and your parent and you and your child is life-long, and not eroded by age or marital status? Ponder that thought for a minute.
- How would you deal with the awful prospect of the loss of your own 18-year old son or daughter due to gross medical errors? How would you react with the fact that you can't go to court or get any legal representation because you are not allowed a loss of society claim and don't have an economic loss with a young adult/child or elderly parent under the current flawed Wisconsin law?
- Consider the prospect of the loss of your mother or father due to medical errors in a simple medical procedure and you can't get answers, accountability or justice.
- How would you deal with the fact that you can't get any attorney to take your case because of the current law limits what can be done?
- Do you feel comfortable with Wisconsin being one of ***just 6 states of 50*** that make arbitrary distinctions in legal rights, based on the age and marital status of the victim?
- Think about this, do you have less love? Less compassion? Less affection? Or less connection to your family members when they become 18 or even when they become 60 years old?
- And finally, was it really the intent of the Wisconsin State Legislature to implement a biased and discriminating law that denies equal protection that says your loving son or daughter, over 17 years old and your single mother or father has **ABSOLUTELY NO VALUE.**

The Wisconsin Family Justice Network and the rest of the citizens of this state simply want a single standard of access to the courts and accountability for all citizens. It is a fundamental matter of equity and equality; the current law is biased, discriminating and totally unfair and must be changed.

SENATOR JEFF PLALE
SEVENTH SENATE DISTRICT

CHAIR
COMMITTEE ON COMMERCE, UTILITIES, ENERGY, AND RAIL

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Testimony of Senator Jeff Plale
Senate Bill 203—The Family Justice Bill
Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing
August 18th, 2009

Thank you, Chairwoman Taylor and members of the Committee, for your consideration of this bill.

Under current law in Wisconsin, a parent does not have the right to recover damages for an adult child who dies as a result of medical malpractice, nor can an adult child recover damages for the loss of a widowed, single, or divorced parent who dies as the result of medical malpractice. This bill will change Wisconsin law to allow these grieving family members some recourse in the face of overwhelming tragedy.

Wisconsin is one of only a handful of states that bars or limits an adult child's right to recover damages in wrongful death actions caused by medical malpractice. I, along with some of my colleagues, have been working for the past few years to change that. This legislation does not guarantee a specific judgment or monetary award. Quite simply, it gives those who have lost a parent or adult child their day in court. I have had numerous constituents and other Wisconsin residents contact me with stories of loss resulting from medical malpractice. Their grief was compounded by the frustration they experienced when they learned there was no legal remedy available to them. These unfortunate events are the reason Representative Richards and I are fighting so hard to pass this legislation.

I have introduced the Family Justice Bill for the past three legislative sessions (2003-04, 2005-06, 2007-08), but it has yet to become law. I hope the outcome this session is different. Thank you.

Testimony in support of Senate Bill 203 (The Family Justice Bill)
Jane M. Spietz
August 18, 2009

Dear Members of the Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform and Housing,

My name is Jane Spietz. I was the Medical Power of Attorney for and best friend of Douglas R. Boone. Doug had routine cervical disc replacement surgery at a hospital in northeastern Wisconsin on May 7, 2007. He entered the hospital a healthy, fitness and nutrition conscious male who appeared much younger than his 54 years. He left ten days later in a hearse bound for the funeral home.

The account of what happened to Doug will sound absolutely incredible to you but unfortunately, this is a very horrible, but true, story.

Shortly after being moved to a patient care unit just hours following his surgery, Doug complained of difficulty breathing. A hospitalist (an in-hospital physician) was dispatched to the room. He attempted to intubate Doug (insert a breathing tube through his mouth) in order to restore his airway.

Incredibly, this doctor did not immediately open Doug's post-surgical cervical collar to check what might be occurring beneath it during this crisis. Under the collar was a huge, fist-sized hematoma (blood clot) that had pushed Doug's trachea (windpipe) **three inches** to the left! (It's no wonder that the intubation attempts failed!) Can you even begin to imagine how Doug suffered as this was going on? And the horrifying panic of being deprived of oxygen? Agony and torture are words that instantly come to mind.

By the time another physician arrived and performed an emergency procedure that restored Doug's airway, it was **too late**. Doug was a victim of anoxic encephalopathy, or, irreversible brain damage due to oxygen deprivation.

The hospitalist who had first come in to "assist" Doug during his crisis mysteriously disappeared after that fateful day. We did not see him at the hospital until exactly one week after the "incident"; for just one day, and after that we did not see him again. We learned from a number of highly reliable sources that he had been "let go" by the hospital. The hospital never admitted to this, even when family members questioned this doctor's whereabouts during a meeting of upper level hospital staff, Doug's family, and I when they reported to us their final results of "three internal investigations" six weeks after his death.

After this most unsatisfactory meeting, I was doing some individual checking around online on the Wisconsin Department of Regulation and Licensing website & discovered to my horror that the hospitalist in question had a history of **cocaine and alcohol dependency** as a physician, with disciplinary action, dating all the way back to 2001 in Ohio!

The most shocking discovery of all was when I uncovered that this doctor had urine tested positive for COCAINE **the day after** I took Doug off life support on May 17, 2007! It was like a knife had been driven though my heart. This, too, is public record on the Wisconsin Department of Regulation and Licensing website under "License Lookup".

Unbelievably, I have since found out that this physician is presently employed at yet **another** hospital in Wisconsin!

WHAT'S WRONG WITH THIS PICTURE?? WHEN WILL THE MADNESS STOP??

Doug Boone's family's ongoing heartache is compounded by the fact that they were unable to sue for malpractice because he was unmarried, had no minor children and no dependent parent at the time of his death. If he had been killed or injured in a car accident caused by the physician, Doug's family could have sought legal action under our present law. Is this fair? Is this just? Is this rational? I think not.

I am pleading with you to support Senate Bill 203, the Family Justice Bill.

Please support this so that other families will not have to face an absence of legal recourse after suffering the loss of a loved one due to inexcusable circumstances. Maybe even someone who is special to **you**. A beloved family member. Mother, father, son, daughter. Think about it! We never, ever thought that something as horrible as this could happen, but it did.

The many people who had the opportunity to know Doug Boone would agree that Doug worked tirelessly to bring about positive change in our society at all levels. As the old saying goes, "a mind is a terrible thing to waste." What a terrible waste this was, indeed.

I filed a formal complaint with the Joint Commission and intend to file a complaint with the Wisconsin Department of Regulation & Licensing as well. I plan to testify at all public hearings & attend community events that are held in support of the passage of the Family Justice Bill.

Speaking for myself and members of Doug Boone's family, we thank you all in advance, from the bottom of our hearts, for your support of the Family Justice Bill.

Sincerely,

Jane Spietz
Medical Power of Attorney for and best friend of Douglas R. Boone (1952-2007)
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Oshkosh WI 54904-8834
(920) 410-3373
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FAMILY JUSTICE BILL SUPPORT – BETTY PAWLIK

Children of Betty Pawlik

Lee McNaughtan Menomonee Falls, WI

Larry Pawlik Waukesha, WI

We'd like to tell you about our Mother Betty. She had a loud laugh that could be heard down the block when we were kids. She was quite a character; she loved to be called Betty Boop so people would remember her. She always told you what she thought, even if it would hurt your feelings. She believed in telling the truth.

Our dad died 23 years ago. My brother and I were her caregivers for a lot of different things, her shopping, doctor appointments, legal issues, or just being there when she needed us. Two and a half years ago, she went into a nursing home where she flourished. She was given good meals, proper doses of medicine, and most importantly, she met new friends, played Bingo, and bet on horse races, which earned her auction bucks so she could buy us all gifts. She met her best friend Marian, who at 86 was to marry another resident, Bob, in September 2009. She was to be their flower girl at 81 years young. She had a great life those last years. Who would've thought it would end so soon.

Our mom was admitted on April 19, 2009 to the hospital for Bronchitis. She told us not to come visit because she was so ill. Being adult children we did not listen, we came. Because she was so ill, her mobility was rated to need 2 assistants with a gait belt when being moved. Also, she should have had a chair and bed alarm, but she did not. She had one person assist instead of 2 and no gait belt.

By about April 24th, she showed marked improvement and was nearing release. On September 26th, 2009, Ashley, an employee of Community Memorial, assisted her to the bathroom. My grandmother told Ashley she felt shaky like she was going to fall. Ashley told her, "No, you're fine." She wasn't; she fell to the floor, twisting her femur. The doctor on call did not order x-rays, nor did anyone call us. We came to find out that rather than having the two assistants and a gait belt only 1 person assisted her, and this was the negligent citation the hospital was issued.

She fell at 9:00 p.m. on April 26th, 2009. There was NO call from a nurse, NO medication given for pain, which was rated at 10, the highest on a Pain scale. She had a severely twisted femur break, which is the biggest bone in your body. She had four units of blood before surgery. All they did was put a rod in. Our mother was devastated. She had to wear diapers, which she had never had to do before. She was crippled.

My grandmother called my mom Lee at work on Monday, crying because she was in so much pain. My mother and I tried unsuccessfully to talk to someone about the fall in Risk Management. When my mom finally talked to someone she claimed she was leaving for Mexico in 15 minutes and could not talk.

By Thursday, April 30th, 2009, blood was pooling around her leg, requiring 4 units of blood. The doctor suggested surgery, putting a rod in her leg. He indicated that she would never walk again, only get up and pivot. Her surgery was scheduled for May 2nd, her 81st (and last) birthday. After surgery, she was exhausted and just did not have the strength after recovering from Bronchitis and surgery.

A couple of days after the fall the person assisting her when she fell came in off-duty with her young child to apologize to my grandmother. Of course my grandmother felt bad for her and did not want her to lose her job. That is what my grandmother was concerned about, not the fact that she would never walk again.

After the fall, her granddaughter, Michelle, called the State to investigate what happened to my grandmother. The State agreed it warranted an investigation, after which the hospital was given 5 State and Federal citations for violations of quality of care for the fall and other hospital violations. We called her Doctor. He was embarrassed and called the Nurses to let them know how shocked he was. The State also looked into 9 other patients during their investigation, finding that the hospital was still at fault with those patients as well.

After the fall, Michelle was so angry that this could happen at a hospital, to whom we are so trusting of our lives, that she made a promise to her grandmother that she would not let this go, she was going to be her advocate so this never happens again. Grandmother looked at Michelle, smiled, and said, "Honey you do what you need to do." She then talked about her dying and how she wanted to be cremated and that she made

her peace with God. She also indicated that she wanted a Betty Boop urn to put her ashes in and she wanted to be on my mom's shelf on display so that people could see her all the time. I told her she wasn't going anywhere, I had to beat her at Skip-Bo yet. She was such a character, always the center of attention.

She went home to River Hills West where she steadily went downhill. No one recognized her anymore. She wasn't the loud, bubbly person with such spunk, she lay in bed and slept most days, never turning on the T.V. to watch her favorite shows, Matlock and Perry Mason. We brought her favorite foods, cheesecake, pizza, and mint musketeer bars...she didn't want it. Michelle never did get a chance to share another morning coffee or play a game of Skip-Bo.

Betty was moved to hospice on June 24th, 2009 because she required too much care for the wing she was in. She told her daughter it was a great ride while it lasted. Michelle's 11-year-old son loved his Betty Boop grandma and wanted a chance to say goodbye to her. He sat with her holding her hand and talking to her, she even looked up and smiled at him.

Michelle sat there for the shortest 7-½ hours of my life. She read the newspaper to her and watched Perry Mason and Matlock. She used to tell us she was afraid to die, so Michelle sang "Be Not Afraid" and prayed that her soul would make an easy transition to heaven. She passed the next morning on June 25th, 2009 at approximately 6:20 a.m. Michelle had plans to be there about 7 a.m., but when she got there, she was still with us because when I kissed her forehead she was still warm. We know her soul was there but a while later we felt she was already gone. We still cannot imagine a world without Betty Boop. Michelle cannot erase her name from my cell phone; she was the person she could tell anything to. She would not judge, but she would tell you what she thought. She was the most honest person I know.

She told us how much she loved us, said good-bye to all her friends who all had stories about Betty Boop. We were there until the end on June 25th, 2009. We still can't believe she is gone due to the disregard of the safety rules that the hospitals themselves put in place. The Waukesha Medical Examiner took her body away, which they always do when someone dies of a fall if the fall occurred within one year.

We found out later that 70% of patients die within a year after falling. You would like to think that with statistics like these, they would protect them even more. Our mom only lived 8 short weeks after falling. In those weeks, she began entirely failing in health. She declined to her death. We took care of her all of those years, now we have no legal recourse for what the hospital did. We can't hear our Mother's laugh anymore, she can't tell us how much she loves and appreciates us and we can no longer tell her we love and appreciate her. We beg you to pass the Family Justice Bill, it would only be fair for everyone. Do it for all your adult children so they can be proud of you.

My grandmother is not here to defend herself but we are here to defend her, and others who have come before and will come after. She gave me strength and determination to fight the most uphill battles. I will not let her die in vain, will you?

I fully support the Family Justice Bill because, no, she did not have minor children nor a living husband, but she had a family in which we were there for her and her for us. We have auto insurance and if you have any kind of business, you have business insurance because there might be a day when you make a mistake and the victim needs to be compensated. Why are hospitals held to a different standard when they pick and choose who is able to make a claim and who cannot? If the hospital made a mistake, they should have to pay the consequence just like any other business, for goodness sake, we trust our lives to them, the most important gift we have.

Republican, Democrat that does not matter here. It is holding a hospital accountable for their actions. I am here to support the Family Justice Bill to protect your single parent or adult children. No matter the age or status, it is about family and seeing that someone like my grandmother will be treated following the policies and procedures set forth in the hospital, and that this will never happen again.

Aug. 18, 2009

Harvey L. Gregory

Dear Legislators,

How many hearings does it take to pass a law? The Family Justice Bill has been passed in the Senate since October 31, 2001.

All the families that lost loved ones from then until now have told you of our pain and sorrow that we are going through each and every day, we miss them. We hope that you never have to go through what we have been going through.

The blood of our loved ones rests in your hands!

A simple YES vote can remedy the passage of The Family Justice Bill.

Please look at all of the names of families who lost loved ones. The count is 68 now and may be closer to 100.

How many lost lives does it take to get a law passed? Shame on you Assembly, Judiciary, and Ethics Committee! Shame on you! The Wisconsin voters who signed the petition do they mean nothing to you?

Sincerely,

Harvey L. Gregory

Peter Torgerson
Culfax (mother)

Anita Harris
Milwaukee (son)

Jamest Dottie Webb
Whitewater (daughter)

Eric + Linda Rice
Middleton (daughter)

Dimitri Jordan
Milwaukee (mother)

James Bollig
Cottage Grove (father)

Sharon Kind
West Bend (mother)

Jonna Fedie
Hammond (mother)

Mary Mc Bride
Madison (father)

Mack Kirksey
Brown Deer (mother)

Mary Siedschlag
Argyle (mother)

Kathleen Sese
Kewauskum (son)

Carolyn Walasek
Park Falls (mother)

Helen Szurovecz
Milwaukee (mother)

Susan Czapinski
Madison (mother)

Pam Vertanen
Manitowoc (mother)

Patty Schey
Wauwatosa (father)

Steve Janasik
Park Falls (mother)

Harriet Yancey
Milwaukee (father)

Sheryl Holdmann
Muskego (mother)

Jake Budrick
Sauk ville (mother)

Lee Davis
Menomonee Falls (brother)

Ray + Betty Lange
Beaver Dam (son)

Rosemary Halverson
Readstown (mother)

Jeanine + Lauren Knox
Milwaukee, (mother

Stephanie O'Connell
Green Bay (father)

Roger Fransway
Chippewa Falls (sister)

Jim + Donna Harvey
Waterford (mother)

Sherry Ellis
Oak Creek (mother)

Bernice Watts
Brown Deer (daughter)

Sandy Gunwaldt
New Berlin (mother)

Dan + Kim Leister
Mukwonago (daughter)

Lonny + Rhonda Brown
Chippewa Falls (son)

Willie Davis
Milwaukee (mother)

John Zachar
Greendale (mother)

Judy Demeuse
Colgate (father)

Lee Brown
Milwaukee (mother)

Taron Monroe
Milwaukee (

Harvey + Diane Gregory
Menasha (son)

Michelle Martin
Green Bay (mother)

Phil Tipke
Cottage Grove (son)

Seanne Hanson
Neenah (son)

Sister of Jackie Hemenway
Twin Lakes (father)

Mark Lavalle
Twin Lakes (mother)

Lisa Jacabsen
Darlington

Bernice Fiebet
West Bend (daughter)

Christine + Doug Spindler
MN River Falls (son)

Elfie Schneider
Grafton (mother)

Myron + Barbara Daczyk
Menasha (daughter)

Nancy Hoffman
Green Bay (father)

Resita Dorsey
Milwaukee (mother)

Barbara Hawley
Oshkosh (mother)

Ed Kelley
Racine (brother)

Linda Heinrich
Greendale (mother)

Mary + Richard Piechocki
Pulaski (daughter)

Loretta Nakielski
Iron Ridge (father)

Rick Rodriguez
Milwaukee (brother)

Kristine Henricksen
Milwaukee (mother)

Robert Hughes
Sparta (self)

Debbie Schreiber
Depere (son)

Theresa Dawson
Milwaukee (mother)

Jamie Martin
Kansasville (father)

Larry Rasmussen
wi (son)

Lynn Mallak
West Allis (ex-husband)

Linda Steinke
Oak Creek (son)

Maureen Flieter
Hilbert (father)

Tom May
Hustisford (father)

Tom Gauthier
Oshosh (mother)

Jane Spietz
Oshkosh (Doug Boone - friend)